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NO. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

AUGUST KLAPPROTT, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions in the circuit court of appeals (R. 26-34) are reported at 166 F. 2d 273. The opinion of the district court (R. 16-20) is reported at 6 F. R. D. 450.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 12, 1948 (R. 35). The petition for a writ of certiorari was filed on April

10, 1948, and certiorari was granted on May 17, 1948 (R. 37). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

Whether after 4½ years petitioner may be entitled to the setting aside of the default judgment of denaturalization taken against him.

1. Because he was taken into custody seven days prior to the expiration of his time to answer and kept in custody thereafter, during which time, although his custody did not prevent him from taking steps to defend himself, he made no effort to do so except to request an attorney to act for him before the default.

2. Because the Government did not introduce clear and convincing evidence to support the default judgment.

3. Because counsel was not appointed to defend petitioner.

4. Because the complaint allegedly did not state a cause of action.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules appear in the Appendix, *infra*, pp. 54-58.

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[1] Effective September 1, 1948, 28 U. S. C. 1254 (1) became the jurisdictional basis for cases of this type. Pub. L. No. 773, 80th Cong., 2d Sess.

STATEMENT

In May 1942, the United States commenced proceedings in the United States District Court for the District of New Jersey, pursuant to Section 338 of the Naturalization Act, to cancel petitioner's certificate of naturalization on the ground that he had taken a false oath of allegiance (R. 2-5).

The complaint alleged, *inter alia*, that defendant "is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund and its affiliates in and about the district of New Jersey," that he had been president of the Bund and an officer of various affiliated organizations, and that since 1935 he had made many "*statements indicating his allegiance* and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America" (R. 3). A summons was personally served on petitioner on May 15, 1942 (R. 1). When petitioner failed to make his appearance within the 60-day period fixed by the statute, judgment by default was entered against him on July 17, 1942 (R. 5-6).

Four and a half years later, in January 1947, petitioner moved in the district court to vacate the judgment of denaturalization (R. 7-13). In an affidavit submitted in support of the petition, he alleged that at the time he was served with the summons on May 15, 1942, he was in ill health, and was recuperating at the German-American

Bund camp, known as Camp Nordland, and that because of his poor health and straitened financial circumstances, he was unable to obtain an attorney (R. 12). On July 7, 1942, a week before the expiration of his time to answer or otherwise move in the denaturalization proceedings, he was arrested under an indictment returned against him and other Bund leaders in the United States District Court for the Southern District of New York charging conspiracy to violate the Selective Service Act. Petitioner alleged that at the time he was arrested, he had in his possession a letter addressed to the American Civil Liberties Union in New York requesting legal assistance, that the letter was taken from him at the time of his arrest, and that he did not know what had become of it. (R. 12-13.) "Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away" (R. 8). He also alleged that the attorney who was appointed to defend him in the New York conspiracy case promised to look into the denaturalization proceedings, but that the attorney failed to do so (R. 13). He further alleged that from the time of his arrest in July 1942 until November 1946 he was in constant custody under the indictment and conviction on the conspiracy charge (subsequently reversed

by this Court, *Keegan* v. *United States*, 325 U. S. 478), and in connection with the sedition trial in the District of Columbia; that, after his release on the criminal charges, he was taken into custody for deportation and confined at Ellis Island (R. 13-14). He further stated that in July 1945 he and a number of other persons sought an injunction against possible deportation, but that such relief was denied (R. 14). (See *Citizens Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787.)

Petitioner alleged generally that because "he was in custody during all of the time above mentioned, and * * * had no financial means of obtaining proper legal representation, [petitioner] was unable to defend the aforesaid proceeding" (R. 9, 14). It is to be observed, however, that petitioner has not alleged that he was not promptly informed of the entry of the judgment of denaturalization, or that during the 4½ years he made any effort, through the prison officials, by letter to the court or elsewhere, or through the numerous attorneys with whom he was in contact during the course of the three lawsuits to which he was a party, to protest against the judgment or attempt to have it vacated. Nor has he alleged that he was prevented from doing so. He admits that he was still in custody when this suit was commenced (R. 8-9, 13), but alleged no change in his condition which made it any less difficult for him to proceed in 1947 than between 1942 and 1946. The Court will, of course,

take notice, as did the lower courts (R. 19-20, 33), of the change and conditions in Germany between 1942, when Germany was successful on the battle fronts, and 1947, and of the effect which this difference might have had upon petitioner's attitude toward deportation to Germany.

The Government did not answer the petition, but challenged the authority of the court "to grant relief at this time" (R. 17), and the proceeding was treated by the court as a motion to dismiss the petition for failure to state a cause of action. Accordingly, for purposes of the present proceeding, petitioner's allegations of specific fact must be taken as true. Except for this purpose the Government does not admit the truth of the facts averred by petitioner (except those of record), and assumes that the proceeding would be remanded for trial if this Court were of the view that the petition set forth a cause of action.

The district court ordered that the petition to vacate be dismissed (R. 20). In its opinion, the court stated that from petitioner's own affidavit it appeared that his default was imputable to his own wilful and inexcusable neglect, but that even on the contrary assumption, Rule 60(b) of the Federal Rules of Civil Procedure rendered the Court without power to open petitioner's default more than six months after entry of the judgment (R. 17). Treating the petition as a bill of review, the district court held that petitioner had shown no grounds

for such relief, since he could point to no error on the face of the record and no new facts affecting the decree which would warrant its being set aside (R. 17-18). The district court also held that petitioner's delay in seeking relief from the judgment was imputable entirely to his wilful neglect, and that his petition should be dismissed on the ground of laches (R. 19). The court said (R. 19-20):

> * * * It is our opinion that the defendant's initiation of this action at this late date was not prompted by any desire to assume the duties of citizenship but by a recent realization of the serious consequences attendent upon the loss of its privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

On appeal, the order of the district court was affirmed (R. 35), one judge relying primarily on the absence of jurisdiction, although also noting the lack of equity in petitioner's application (R. 26-33), one judge relying primarily on laches (R. 33-34), and one judge dissenting on the ground that the court should have held a hearing before entering judgment (R. 34).

SUMMARY OF ARGUMENT.

I.

Rule 60 (b) (as it read until March 19, 1948) permitted a judgment to be vacated on a showing of mistake, inadvertence, surprise or excusable neglect, if the application was made within six months. It also preserved the rights accorded by the old remedies of *coram nobis*, bill of review and *audita querela*, which, insofar as pertinent here, allowed relief for fundamental error of fact not known to the court and fundamental error of law apparent on the face of the record. It was well established that the use of these remedies was subject to the principle of laches.

II.

We do not doubt that if petitioner had been prevented by imprisonment from answering in time and from promptly moving to vacate the judgment entered by default upon his failure to answer, he would be entitled to relief for fundamental error of fact not known to the court. But it is clear that petitioner's incarceration was not responsible for his inaction. After his arrest but before the time for default he requested an attorney to represent him; the attorney promised to look into the matter but failed to do so. A default resulting from counsel's neglect is of the sort covered by the first part of Rule 60(b), and subject to the six-months' limitation. The taking of such a default does not de-

prive a party of his fundamental rights. And, apart from this limitation, petitioner would be barred by laches by reason of his inaction for 4½ years. He has not alleged that he made any inquiry or protest or took any steps with respect to setting aside the judgment prior to the institution of this proceeding, or that the prison authorities prevented him from doing so. The mere fact that he was in custody did not mean that the courts were barred to him. This Court is familiar with hundreds of cases proving the contrary. Other defendants in denaturalization proceedings were able to defend successfully even though imprisoned both during their entire time to answer and during the remainder of the proceeding. And petitioner's participation in three other lawsuits, in addition to this proceeding, while under detention, in each of which he had counsel, proves that it was not his imprisonment but his lack of interest which was responsible for his failure to take any steps toward setting aside the denaturalization judgment until after Germany had lost the war.

III.

The failure of the trial court to require the Government to submit clear and convincing evidence before rendering a default judgment was not an error of law on the face of the record. A denaturalization suit is a civil action, governed by the civil rules, which permit default judgments generally and specify in what circumstances the

taking of evidence is necessary. There is no such requirement in denaturalization cases. The doctrine that there must be clear and convincing proof in 'contested denaturalization proceedings,' in which the defendant denies the charges, has no application when the defendant defaults. Nor was petitioner entitled to have counsel appointed for him; certainly this is true in the absence of any request and of any showing that his confinement deprived him of an opportunity to obtain counsel. A denaturalization suit is not a criminal proceeding, and the rules as to the appointment of counsel in criminal cases are not applicable. In any event, the remedy for error of law apparent on the record must be exercised during the time for appeal, or, at the very least, with due diligence.

IV.

Petitioner alleges that he was entitled to relief because the complaint does not state a cause of action under the *Baumgartner* decision. If this were true it would not state grounds sufficient for vacating the judgment. Moreover, since petitioner was a Bund leader, the facts alleged are closer to the *Knauer* case than to *Baumgartner*, and are clearly sufficient to state a cause of action for denaturalization under the statute.

V.

The amendment to Rule 60(b) effective March 19, 1948, does not govern this case, since the correctness of the lower courts' decisions must be

tested by the rule in effect when the case was before them. See amended Rule 86. But the amendment would not aid petitioner, since he does not come within its substantive requirements, and also would be barred by the express limitation that motions to set aside judgments must be made within one year for some purposes and within a reasonable time for the other grounds specified.

ARGUMENT

I.

THE PRINCIPLES GOVERNING PROCEEDINGS TO SET ASIDE JUDGMENTS, AND ANALYSIS OF PETITIONER'S CONTENTIONS.

Rule 60 of the Federal Rules of Civil Procedure deals with the circumstances in which a party may obtain relief from a judgment after its entry. Paragraph (a) of the Rule is concerned with clerical errors. Paragraph (b), as it read prior to the amendments effective March 19, 1948, provided as follows:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a

court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

We believe this case is controlled by the Rule as it stood while the case was in the lower courts. See amended Rule 86. We shall show, however, that application of the 1948 amendment would not affect the result in the instant case. See Point V, *infra*, pp. 48-53.

The Rule recognizes two types of cases in which judgments may be vacated. It provides specifically for relief in case of "mistake, inadvertence, surprise, or excusable neglect". But the Rule prescribes a six months' time limit for motions based upon these grounds. It is established by numerous decisions in the lower courts, that the six-month period fixed by the Rule marks the outside limit within which such relief may be granted, and that the provisions of Rule 6(b), *infra*, pp. 54-55 permitting an act to be done after the expiration of a specified period where the failure to act was the result of excusable neglect, can not be utilized to enlarge the time for a motion to open a default under 60(b). *Young* v. *Garrett*, 159 F. 2d 634, 636 (C. C. A. 8); *Oliver* v. *City of Shattuck*, 157 F. 2d 150, 152 (C. C. A. 10); *Wallace* v. *United States*, 142 F. 2d 240, 244 (C. C. A. 2), certiorari denied, 323 U. S.

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The last sentence of Rule 60(b), before its amendment, provided that the "rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding * * *." It has generally been held that this part of former Rule 60(b) preserved, not only the right to bring an independent action in equity to enjoin enforcement of a judgment, but also the remedies available to set aside a judgment by motion after term time, such as writs of *coram nobis*, *audita querela* and bills of review. *Oliver* v. *City of Shattuck*, 157 F. 2d 150, 152 (C. C. A. 10); *Wallace* v. *United States*, 142 F. 2d 240, 244 (C. C. A. 2), certiorari denied, 323 U. S. 712; *Fraser* v. *Doing*, 130 F. 2d 617, 620 (App. D. C.), see Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L. J. 623, 633 (1946). To present a case for relief under this portion of the Rule, petitioner must allege facts which, before the Rules were adopted, would have supported an application to vacate after the expiration of the term.

These older forms of relief were overlapping in scope; several of them allowed relief for the same basic deficiencies, such as fraud or lack of jurisdiction. In brief, it can be said that the writ of *audita querela* afforded relief for matters of fact occurring before or after the rendition of the judgment (Moore and Rogers, *supra*, pp. 659-669 (1946)). The writ of *coram nobis* was available to bring before the court errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the proceeding. See Moore and Rogers, *supra*, pp. 669-674; *United States* v. *Mayer*, 235 U. S. 55, 68. A bill of review in equity is allowed to correct an error of law apparent on the face of the record, because of newly discovered evidence or new facts occurring after the decree is entered, and for fraud. Moore and Rogers, *supra*, pp. 675-682. So far as applicable here, the relief available under the older remedies may safely be summarized as affording a means, after term time, for the vacation of a judgment for fundamental errors of fact not in issue in the original proceeding or for fundamental errors of law apparent on the face of the record.

These writs and forms of action were subject to no definite time limits. But parties invoking them were bound to act within a reasonable time in the circumstances of the case,—that is, in accordance with the doctrine of laches. This is not only confirmed by the cases and secondary authorities, but

by the restatement of the substance of the old actions in the amended Rule 60(b), which requires that motions be made "within a reasonable time" in cases not governed by the definite limitation of one year. See pp. 49, 52-53, 57, *infra*.

Moore and Rogers' authoritative and exhaustive study of Rule 60(b) and the older remedies underlying it declares repeatedly that with respect to time they were governed by the principle of laches. Moore and Rogers, *supra*, pp. 636n, 664, 668, 674, 677, 679, 686. Many decisions so hold with respect to bills of review based upon newly discovered matter or fraud and *coram nobis;* a smaller number of cases indicate that the same is true as to the more rarely used writ of *audita querela*. Bills of review for error of law apparent on the face of the record were required to be filed within the time for appeal.[1] See page 44, *infra*. Bill of review for newly discovered matter: Moore and Rogers, pp. 677, 679; *Brown* v. *County of Buena Vista*, 95 U. S. 157; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 512; *Hagerott* v. *Adams*, 61 F. 2d 35, 36 (C. C. A. 8), certiorari denied, 288 U. S. 599; *Zegura* v. *United States*, 104 F. 2d 34 (C. C. A. 5), certiorari denied,

[1] "If the bill of review is based upon errors appearing upon the record, it must be filed within the time in which an appeal could have been taken. If, however, the bill of review is based upon fraud in obtaining the decree, or for newly discovered evidence, the time within which it should be filed is governed by the general equitable rules of laches." *Taylor* v. *Easton*, 180 Fed. 363, 368 (C. C. A. 8); *Hagerott* v. *Adams*, 61 F. 2d 35, 37 (C. C. A. 8), certiorari denied, 288 U. S. 599; *McGinn* v. *United States*, 2 F. R. D. 562, 564 (D. Mass.).

308 U. S. 586; *Price* v. *National Surety Corp.*, 127 F. 2d 726 (C. C. A. 6), certiorari denied, 316 U. S. 683; *Ex Parte Thomas*, 114 F. 2d 847 (App. D. C.); 3 Moore, *Federal Practice*, 3263-3264; Dobie, *Federal Procedure* (1928) 763-764; Simkins, *Federal Practice* (3rd ed. 1938) § 720; 8 *Cyc. Fed. Proc. Sec.* 3609; 34 C. J. 409; *Coram vobis:* Moore and Rogers, pp. 636n, 674; *Bronson* v. *Schulten*, 104 U. S. 410; *Spaulding* v. *United States*, 155 F. 2d 919 (C. C. A. 6); *United States* v. *Mahoney*, 43 F. Supp. 943, 945 (W. D. La.); *United States* v. *Wright*, 56 F. Supp. 489, 492 (E. D. Ill.); *Irwin* v. *State*, 220 Ind. 228, 240-248 (1942); *People* v. *Lambley*, 8 Cal. 2d 752, 761 (1937); *People* v. *Vernon*, 9 Cal. App. 2d 138, 142-143 (1935); *People* v. *Harincar*, 49 Cal. App. 2d 594, 596 (1942); *People* v. *Kelly*, 35 Cal. App. (2d) 571, 575 (1939); *Milam County* v. *Robertson*, 47 Tex. 222, 239-240 (1877). *Audita querela:* Moore and Rogers, pp. 664, 668; *Humphreys* v. *Leggett*, 9 How. 297, 313; cf. *Avery* v. *United States*, 12 Wall. 304, 307.

This brief summary demonstrates that judgments may be vacated on grounds of mistake, inadvertence, surprise or excusable neglect if the application is made within six months. They may be vacated for error of law apparent on the face of the record, or for fundamental error of fact not known to the court, when the party is not at fault, so long as the application is not unduly delayed.

We shall now apply these principles to the issues raised by this case.

Petitioner alleges (1) that a default judgment in a denaturalization case cannot lawfully be entered without the introduction of clear and unequivocal evidence, (2) that his constitutional rights were abridged because the Government took a default while keeping him in custody, and (3) that the complaint does not state sufficient facts to constitute a cause of action.

The first contention can be said to allege an error of law apparent on the face of the record, since it appears from the record that the default judgment was taken as a result of petitioner's failure to answer and without the introduction of evidence. The second contention would appear to rest on the fact of imprisonment, a fact outside of the record and unknown to the court at the time of the entry of the judgment. These two contentions, if substantiated, would be of the types for which *coram nobis* or a bill of review might have afforded remedies. The third contention, as to the sufficiency of the facts alleged in the complaint, is clearly not the kind of charge for which a remedy after judgment is available.

We shall demonstrate in the following Points that none of these contentions has merit, and that, as to each of them, the petitioner is barred by his failure over a long period of years to question the validity of the judgment against him.

II.

THE IMPRISONMENT OF PETITIONER DID NOT DEPRIVE HIM OF AN OPPORTUNITY TO DEFEND.

As a whole, petitioner's application in the district court, and the contentions he makes in his brief in this Court, attempt to present the picture of a defendant who has been forcibly prevented by the opposing party, in this case the Government, from having an adequate opportunity to defend. In effect, he is arguing that his arrest on another charge before his time to answer had expired, and his subsequent custody, made it impossible for him to present his defense on the merits.

Were that an accurate picture, we have no doubt that a court would not find itself powerless to grant relief under one or another of the older remedies. Such facts would most closely approximate a case for relief under a writ of error *coram nobis;* they would be "errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself"; errors "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer*, 235 U. S. 55, 68, 69; see *Sanders* v. *State*, 85 Ind. 318, where a plea of guilty was set aside on a writ of error *coram nobis*

on the ground that it had been induced by mob violence. See also Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 Virginia Law Rev. 423. Thus we do not dispute the power of a federal court to set aside a judgment on a showing of truly basic injustice, such as that a defendant, for reasons beyond his control, has been forcibly prevented by the opposing party from having an adequate opportunity to defend.[2]

We think it clear, however, that petitioner has made no such showing. We have in this case only petitioner's own statements as to his reasons for failing to answer and for failing to take action to be relieved from the judgment over a four-and-one-half year period. Taking those statements at their face value, the district court and the majority of the court below found that petitioner had failed to make out a case even of excusable neglect, much less of fundamental injustice. That conclusion, we submit, is amply justified by the record.

The essence of petitioner's argument is (1) that by having him arrested seven days before the expiration of his time to appear and answer the Gov-

[2] On the assumption that imprisonment deprived petitioner of his opportunity to defend, he would be acting within a reasonable time if he did not delay unduly in instituting proceedings after his release from custody.

ernment prevented him from answering, and (2) that he was unable to bring the matter to the court's attention more promptly because he was in custody continuously thereafter.

By petitioner's own account, at the time of his arrest on the New York conspiracy indictment, 53 days after he had been personally served with the summons and a week before the time for his answer would expire, he had taken no steps whatever to secure representation in the denaturalization proceedings. He now alleges that at the time of his arrest he had prepared a letter to send to the Civil Liberties Union, but he makes no allegation that he attempted to discover what happened to that letter or that he attempted to communicate further with that organization. He also alleges that at the time of his arrest he was drawing up a draft of answer to the complaint which he was unable to complete because he was taken into custody. But again he is significantly silent as to any inquiries on his part as to the disposition of this alleged draft or as to any complaint on his part concerning his inability to file an answer. He does not aver that the Government refused to obtain these documents for him at his request, or that he made any request.

Of greater importance is his allegation that in the conspiracy case in New York, "Since petitioner had no funds with which to retain an attorney, the court appointed an attorney, by the name

of McDonald, to defend him and at that time petitioner brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but petitioner later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against petitioner by default, after having, by his promises, lulled petitioner into a sense of security with respect to this matter" (R. 8). On its face this shows that his imprisonment did not cause his default, or prevent him from obtaining an attorney. The default resulted from the alleged failure of the attorney who agreed to look into the matter to do so. The default caused by the negligence of one's attorney does not deprive one of his constitutional rights, particularly since it is remediable by a timely application for relief; it cannot be attributed to the Government. So far as appears, petitioner had been in contact with no attorney during the entire preceding period prior to meeting Mr. McDonald.

The judgment in this case thus resulted from the common type of default caused by counsel's neglect. See 34 C. J. 307-316; 49 C. J. S. 506; 114 A. L. R. 279; *Miller Rubber Company* v. *Massey*, 36 F. 2d 466 (C. C. A. 7), certiorari denied, 281 U. S. 749. The provision in Rule 60(b) allowing relief from judgments entered as a result of "inadvertence" or "excusable neglect" would seem to have been meant to deal with defaults of this

sort.[3] As we have seen, motions to be relieved from such judgments must be made within six months—certainly a reasonable time for a defendant truly concerned as to a judgment on such an important matter as his citizenship.[4] Petitioner did not comply with this reasonable requirement.

In *Wallace* v. *United States*, 142 F. 2d 240 (C. C. A. 2) certiorari denied, 323 U. S. 712, plaintiff's counsel did not appear when the case was called for trial and the suit was accordingly dismissed for want of prosecution. More than two years later the plaintiff moved to vacate the judgment. The court of appeals held that the trial court lacked jurisdiction to grant the motion because not made within six months; the case was obviously regarded as one which might have come within the category of "excusable neglect" if the motion had been filed in time. The court of appeals recognized that Rule 60(b) preserved the remedies previously available under the old writs and

[3] See in addition to the cases cited immediately following in the text, *La Barbera* v. *Grubard*, 112 F. 2d 738 (C. C. A. 2); *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb.); *United States* v. *Mutual Construction Corp.*, 7 Fed. Rules Serv. 60b.24 (E. D. Pa.); *Standard Grate Bar Co.* v. *Defense Plant Corp.*, 3 F. R. D. 371 (M. D. Pa.); *Startzman* v. *Los Banos Cotton Gins*, 82 Cal. App. 624 (1927); *Starkweather* v. *Mining Co.*, 5 Cal. App. 2d 501 (1935); *Detroit Fidelity and Surety Co.* v. *Foster*, 170 S. C. 121 (1933); *Ham* v. *Person*, 173 N. C. 72 (1917); *Taylor* v. *Pope*, 106 N. C. 267 (1890); 3 Moore, *Federal Practice*, 3280-3281 and cases cited.

[4] Petitioner does not allege that he was not promptly informed of the entry of the judgment.

the bill of review. But the court stated (142 F. 2d at 244),

> * * * Obviously it cannot have been intended that what may be done within six months, pursuant to the body of Rule 60(b), may also be done thereafter, under the exception contained in its last sentence.

Other cases holding the six-months' limitation applicable to judgments rendered as the result of neglect of counsel are *Reed* v. *South Atlantic S.S. Co.*, 2 F.R.D. 475 (D. Del.); *Sharlot* v. *Ford Motor Co.*, 9 Fed. Rules Serv. 60b.31 (E.D.N.Y.); *Ogniewski* v. *New York Central R.R.*, 9 Fed. Rules Serv. 60b.31 (W.D.N.Y.); *Weller* v. *Socony Vacuum Oil Co.*, 2 F. R. D. 158 (S.D.N.Y.). Since petitioner did not make his motion to vacate for long after six months it is thus plainly out of time.

Even if it be assumed that the older forms of remedies might be available to petitioner for this form of neglect,[5] petitioner is not entitled to relief.

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[5] The cases distinguish between inadvertent or negligent default by counsel and unauthorized stipulating away of a client's case in the course of representation. The former was governed by the first two sentences of original Rule 60(b). *Wallace* v. *United States*, 142 F. 2d 240, certiorari denied, 323 U. S. 712; *Sharlot* v. *Ford Motor Company*, 9 Fed. Rules Serv. 60b.31 (E. D. N. Y.); *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475 (D. Del.); *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb.). The latter has been held to justify relief such as is granted in *coram nobis* without definite time limit. *United States* v. *Beebe*, 180 U. S. 343; *Preveden* v. *Hahn*, 36 F. Supp. 952 (S. D. N. Y.); *Cavallo* v. *Agwilines*, 2 F. R. D. 526 (S. D. N. Y.); *McGihn* v. *United States*, 2 F. R. D. 562 (D. Mass.).

For he still must show that he acted diligently, as a reasonable man in like circumstances would have acted.

What would the ordinary man have done when he discovered that a default judgment had been entered against him by reason of his attorney's neglect in a case of any significance? He would immediately protest, to any official he could reach—the court, another lawyer, or, if he was in custody, the prison authorities. If he could not see such persons he would write them. He would not wait 4½ years—if he were really interested in having the judgment set aside. He would almost certainly not even wait 4½ weeks before making some effort to protect his interest.

But the petitioner has not alleged that he took any steps at all prior to 1947. He does not aver that he complained to any prison official, wrote to the court or to any attorney, or in any other manner sought relief from the judgment.[6] His admitted affiliation with the German-American Bund (R. 12, 15), of which he was at one time president

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[6] Cf *Irwin* v. *State*, 220 Ind. 228, 244, in which the court stated:

> "It does not appear that they asked to be taken back into court or that they made any effort whatever to advise the trial court, or the prosecuting attorney, or their families, or friends that they had not intended to plead guilty to kidnaping, and that they did not know when put upon their plea that they were charged with kidnaping, nor is there evidence of facts which would tend to explain or excuse their failure to act for more than four years."

(R. 3), and the German victories of 1942 suggest a reason for his lack of concern for his American citizenship at that time and for the subsequent period prior to the threat of deportation. The court below wisely observed that (R. 33):

> It is quite evident that his citizenship becomes more valuable now that the war has been concluded. Germany has lost and the possibility of deportation is not a gratifying prospect.

Petitioner's alleged reason for his complete inaction is that he was in custody during the period when action could normally have been anticipated. Perhaps in ancient times custody was a barrier to ability to defend; it is not a barrier now. This Court is well aware that incarceration in a federal institution does not prevent a prisoner from writing letters or seeking legal assistance. As the Supreme Court of Indiana stated in *Irwin* v. *State*, 220 Ind. 228, 244: "It is commonly known that prisoners in the state prison have the privilege of writing letters and communicating with their families and friends and with courts and public agencies, and that they have the privilege of receiving visitors on stated occasions." Judicial records show that between 1937 and 1947 1,912 petitions for habeas corpus were filed by prisoners in three federal penitentiaries alone.[7] The Court of Ap-

[7] These statistics are compiled and set forth in the brief for the respondent in *Price* v. *Johnston*, October Term 1947, No. 111, pp. 64-65.

peals for the District of Columbia has noted that between July, 1941, and October, 1944, 635 petitions for habeas corpus were filed in the District court. *Dorsey* v. *Gill*, 148 F. 2d 857, 862-863, certiorari denied, 325 U. S. 890.

The regulations of the Bureau of Prisons allow prisoners to write letters, and make provision for the employment of attorneys by prisoners.[8] Although there is no rule expressly defining the rights of prisoners with respect to counsel, the Director of the Bureau of Prisons has advised the Solicitor General that:

> It has been the policy and the practice of the Bureau of Prisons and of all federal institutions at least since the establishment of the Bureau of Prisons in 1930 to permit every inmate access to an attorney of his own choice. Whether awaiting trial or serving a sentence an inmate may employ counsel to advise or defend him. He need only make his request known to the Warden or Parole Office of the institution to be granted permission to write an attorney seeking his services. Once an attorney is employed, he is permitted to correspond with and visit the inmate as the circumstances of the case may require.

The practice in the District of Columbia jail, in which petitioner was held for some months, is the same.

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[8] U. S. Bureau of Prisons, MANUAL OF POLICIES AND PROCEDURES, 1942, Ch. X, pp. 117, 131, Regulations 1 to 10 and 31.

Persons held in custody by reason of the conspiracy charges involved in the New York proceeding against petitioner were no more disabled from protecting their interests than other prisoners. Eight of petitioner's co-defendants in the New York case filed answers in denaturalization proceedings brought against them while they were in custody, although they were detained during the entire 60 days available for answering the denaturalization complaint, and indeed during the entire course of the subsequent proceeding.[9] Of these eight defendants, two (Weiss and Bregler) ultimately prevailed on appeal (*United States* v. *Hauck*, 155 F. 2d 141 (C. C. A. 2)); a third (Streuer) was denaturalized after trial (*United States* v. *Baecker*, 55 F. Supp. 403, 435 (E. D. Mich.)), but subsequently had the judgment vacated for reasons not pertinent here (*United States* v. *Streuer* (E. D. Mich.), Civil No. 3656); the cases of three others (Ottersbach, Bachmann and Belohlavek) were ultimately dismissed by the Government (*United States* v. *Ottersbach* (N. D. W. D.

[9] The records of the denaturalization cases appear in the files of the district courts and reported decisions, as well as in the files of the Department of Justice. They show when complaints were served, answers filed and judgments entered, and the disposition of the cases. The period of the defendants' detention in connection with the New York conspiracy case appears from the court records in the New York proceeding and the records of the Bureau of Prisons; these show that they were all in custody from the time of their arrest until the reversal of their conviction in *Keegan* v. *United States*, 325 U. S. 478, in June 1945.

Wash.), Cause No. 672; *United States* v. *Bachmann* (N. D. N. Y.), Civil No. 1178; *United States* v. *Belohlavek*, (N. D. Ohio E. D.), Civil Action No. 21519). Willumeit withdrew his answer and consented to judgment (*United States* v. *Willumeit* (N. D. Ill.), Civil Action 4713). Kunz was denaturalized after a trial (*United States* v. *Kuhn*, 49 F. Supp. 407, 416), and did not appeal; his subsequent motion to vacate the judgment was denied. See *United States* v. *Kunz*, 163 F. 2d 344 (C. C. A. 2), in which the Court held that the applicant's imprisonment would not have prevented an appeal from the original adverse judgment.

Petitioner has not averred that he made any effort to avail himself of the procedures available to prisoners generally, or of the methods which prisoners have commonly used to get into court. He argues (Brief 24-25) that his "entanglement" in other legal proceedings justified him in not moving more expeditiously. But these other proceedings prove that petitioner was not held incommunicado —as his repeated references to custody seem to imply. They show that he had more, rather than less, opportunity than other prisoners to obtain legal advice and representation.

While petitioner was in custody he was party to three law suits prior to this proceeding. In 1942 he was tried in New York on the conspiracy charge which came before this Court in *Keegan* v. *United*

States, 325 U. S. 478. At that time the district court appointed Mr. McDonald to represent him (R. 8). Despite petitioner's present allegations as to Mr. McDonald's failure to represent him in the denaturalization case, the record of the trial in New York shows that Mr. McDonald continued to represent him there. The New York trial lasted one month, from September 17 to October 19, 1942. See 325 U. S. at 480. On each trial day petitioner was doubtless in the courtroom, with his own counsel and with at least eleven lawyers representing the other defendants with whom the prisoner could have talked.[10] He was represented by counsel on appeal to the circuit court of appeals and in this Court. In 1944 petitioner was a defendant in the so-called sedition trial in the District of Columbia. He was represented by counsel, and sat in the courtroom for about eight months (R. 9), along with over twenty lawyers representing the various defendants. *United States* v. *McWilliams*, 54 F. Supp. 791 (D. D. C.). In those suits petitioner was a defendant. But in 1945 petitioner was plaintiff in a suit against the Attorney General to enjoin his deportation (R. 9). He was represented by counsel in the district court, the Court of Appeals and this Court. See *Citizens Protective League* v. *Clark*,

[10] The number of attorneys appearing for the various defendants is shown by the trial record in the Southern District of New York. Eight lawyers appeared for the defendants on appeal to the Circuit Court of Appeals. *United States* v. *Keegan*, 141 F. 2d 248 (C. C. A. 2).

155 F. 2d. 290 (App. D. C.) certiorari denied, 329 U. S. 787.

These three proceedings show that not only prisoners generally, but petitioner in particular, have not been disabled by imprisonment from being represented in court. And the instant case affords further proof, if that is necessary. For petitioner was still in custody when this proceeding was commenced. He has not alleged that his early confinement was more strict, or that greater obstacles to the securing of counsel were placed in his way at the earlier stages than now.

All of these facts confirm our contention that not his imprisonment but his inaction was responsible for petitioner's not moving to set aside the judgment of denaturalization for 4½ years. And the factor which moved him to action was not any lessening of the bonds of his custody. His custody, therefore, is not a valid excuse for the delay. It is merely a circumstance seized upon in an attempt to give plausibility to an argument motivated by his only recently acquired preference for residence in the United States rather than Germany. When one recalls the difference between the status of Germany in July 1942 and January 1947, it is not difficult to infer the reason for the petitioner's new interest in American citizenship. As the Court of Appeals for the Second Circuit noted in *United States* v. *Kunz*, 163 F. 2d 344, 346:

> The fact probably is that neither he nor his Bund associates set much value on American citizenship until the war was over, Germany ceased to be a good place to live in, and they were held for deportation.

We submit that a proper analysis of the allegations shows that petitioner's default was due to the neglect of the counsel he requested to represent him before the default, and that his failure to seek relief for 4½ years was due to his own lack of interest, not to any disability. The case thus does not present any deprivation of fundamental rights for which the older forms of relief were available.

Moreover, since his imprisonment is not a legitimate excuse, it is clear that petitioner did not exercise due diligence in moving to set aside the judgment, as both lower courts held.

A number of the cases cited on page 16, *supra*, to show that the doctrine of laches is applicable to *coram nobis* proceedings were criminal cases in which the moving party was in prison. In *People* v. *Vernon*, 9 Cal. App. 2d 138 (1935), a prisoner waiting 4½ years was held barred from relief by reason of his delay. In *People* v. *Harincar*, 49 Cal. App. 2d 594 (1942), five years was held too long a time. In *Irwin* v. *State*, 220 Ind. 228 (1942), the Supreme Court of Indiana held an application in the nature of *coram nobis* unduly delayed four years after defendants had commenced to serve their sentence. The reasons for the requirement of dili-

gence in such cases are well expressed by the Indiana court, and are extremely pertinent here (pp. 241-242, 245-246):

> * * * after judgment, especially upon a plea of guilty, it [the State] has a right to assume that the transaction is closed and settled, and to rely upon finality of the judgment. There is no apparent reason for longer preserving evidence and keeping contact with witnesses. Law enforcement and judicial officers change, and the State is put to a disadvantage if an unexpected trial should be made necessary. These considerations should not in justice cause a disadvantage to the judgment defendant until he has knowledge of the facts and a reasonable opportunity to seek relief, but if he should thereafter willfully delay the assertion of his rights to the further disadvantage of the State, and to his own advantage, the result may often be not the granting of a trial to the defendant, but the practical denial of an opportunity for the State to prosecute its action.
>
> * * * "When time had removed or so scattered the witnesses of the prosecution, or the memory of those who could be obtained had grown dim, a writ of *coram nobis* would result in certain acquittal."
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> * * * * * * * *
>
> All limitation upon the assertion of rights or the granting of remedies is based upon sound public policy, the reasons for which need no elaboration, and the reasons apply to and are the basis for the court-made requirement of diligence in seeking relief against

> final judgments as well as the arbitrary statutory limitation upon the bringing of actions, both civil and criminal. These limitations operate upon just and unjust claims alike. It has been thought necessary to deny the right to the assertion of even just claims in order that there may be finality and repose. * * * The judicial limitation involved in the requirement of diligence is more liberal and takes into consideration the condition of the party and the surrounding circumstances, and leaves the determination of the question of whether diligence has been established to the sound discretion of the trial court.

Petitioner argues that the doctrine of laches requires some prejudice to the opposing party due to the delay. But as the Indiana court recognized in the statement just quoted, the passage of an additional 4½ years makes proof of petitioner's fraud in 1933 more difficult. One of the reasons underlying all time limitations, including the doctrine of laches, is the difficulty of proving the case after witnesses are scattered and human memories fade. *Brown* v. *County of Buena Vista*, 95 U. S. 157, 161.

Petitioner has referred (Br. 28) to the need for "inequity founded upon some change in the condition or relations of the property or the party," as essential to proof of laches, citing *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, and *Galliher* v. *Cadwell*, 145 U. S. 368. The *Galliher* case, however, from which the quoted excerpt is taken,

affords an interesting parallel to the present situation. The Court there treated it as significant that the complaining party, who was held to be barred by laches, had shown no interest in the land in question until its value greatly increased. Similarly, the value of American citizenship to persons such as petitioner, who are subject to deportation, was greatly enhanced by Germany's defeat and the resulting impoverishment in that country. Petitioner's recently acquired interest in his citizenship is not a persuasive reason for compelling a court of equity to vacate a judgment entered 4½ years ago.

III.

THE FAILURE TO INTRODUCE EVIDENCE IN SUPPORT OF THE DEFAULT JUDGMENT IS NOT A GROUND FOR SETTING THE JUDGMENT ASIDE

Petitioner argues that the default judgment was unlawful because not supported by clear and convincing evidence. The court below treated this charge as an assertion of error of law apparent on the face of the record, inasmuch as the record shows that no evidence was taken. It is our position that the law does not require the introduction of evidence when a defendant in a denaturalization case defaults, and that in any event petitioner is barred from raising the point 4½ years after entry of the decree.

A. *The district court was empowered to enter judgment by default without a hearing.*—Peti-

tioner contends (Br. pp. 9-19) that the district court was without power to enter a judgment of default without hearing evidence. It was on this basis that Judge Stephens dissented in the court below. Neither petitioner nor the dissenting judge have, however, pointed to anything in the statutes, rules, or decisions of this Court which support their position.

Section 338 of the Nationality Act, providing for denaturalization, contains no direction for a hearing before cancellation of a certificate. It merely directs district attorneys "upon affidavit showing good cause therefor" to institute proceedings for denaturalization. The action which it authorizes is manifestly a civil action (see, *infra*, pp. 41-42).

Rule 55(a) of the Federal Rules of Civil Procedure provides for a default judgment against a party who fails to plead or defend. Rule 55(b) provides for entry of default judgment by the clerk if for a sum certain, and by the court otherwise. Rule 55(b) refers to circumstances in which a default judgment may not be entered, such as infancy, and incompetency, and further provides:

> * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such ref-

erences as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 55(e), on the other hand, provides:

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

These provisions demonstrate that when the rule makers wished to make a hearing on the evidence an absolute requirement to entry of judgment despite a default, they knew how to use apt terminology to accomplish that result.[11] They did not do so for denaturalization proceedings, but left them to be governed by the rule applicable to civil actions generally.

The practice prescribed by Rule 55(b) is essentially the same as the old equity practice described by this Court in *Thomson v. Wooster*, 114 U. S. 104. This Court there said, at pp. 110-111:

* * * A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a de-

[11] Petitioner refers to the requirement of evidence in uncontested divorce cases. But this requirement is statutory. For Judge Goodrich's comments on this argument see R. 28.

cree *pro confesso* regards the statements of the bill as confessed.

* * *

A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams* v. *Corwin*, Hopkins Ch. 471, by Hoffman, master, in a report made to Chancellor Sanford, of New York, in which the conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso*, was that "when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."

We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true, 1 Smith's Ch. Pract. 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. * * *

In the *Thomson* case, this Court pointed out, at p. 110, that for at least two centuries an *ex parte* examination on the evidence had not been required in English Chancery practice.

Thus, since long before the adoption of the Constitution, a hearing on the allegations of the complaint has not been required in law or in equity where the allegations of the complaint are clear and the relief sought is definite.

In this case, no hearing was necessary to determine the extent of judgment. The complaint sought limited and specific relief, cancellation of the certificate of denaturalization. The judgment granted the exact relief sought by the complaint. Furthermore, the complaint alleged clearly and definitely that petitioner obtained his certificate of naturalization by fraud in that at the time he took his oath of allegiance to the United States and renounced allegiance to the German Reich, petitioner "did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or a citizen," and that "he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion." (R. 3). Had petitioner, in open court, admitted only that specific fact, a decree of naturalization would have been bound to follow as a matter of course. See *Knauer* v. *United States*, 328 U. S. 654; *United*

States v. *Siegel*, 152 F. 2d 614 (C. C. A. 2), certiorari denied, 328 U. S. 868. Had petitioner written a letter stating that he consented to the decree of naturalization and admitting the facts therein alleged, a court would unquestionably have been justified in dispensing with proof. See *United States* v. *Borchers*, 163 F. 2d 347, 349-350 (C. C. A. 2), certiorari denied, 332 U. S. 811. Petitioner's default was in the eyes of the law the equivalent of a confession in open court. *Thomson* v. *Wooster*, *supra*. Hence, there was no necessity for a hearing "in order to enable the court to enter judgment or to carry it into effect" under Rule 55(b) (2). As the Circuit Court of Appeals for the Second Circuit said in the *Borchers* case, *supra*,

> * * * As to such judgments the default of defendants who have been personally served may well take the place of the "clear and unequivocal" evidence required had the case gone to trial. * * *

On this issue, it is important to bear in mind that we are dealing with a question of power and not of policy. The question here is not whether it might be desirable to hold a hearing before entering a judgment of denaturalization despite a deliberate default. The question is whether a hearing is such an absolute requirement that failure to hold one is an error of law on the face of the record which justifies the setting aside of a judgment. We

submit that a procedure conforming to the established practice of English and American courts for two centuries, a practice which has been changed neither by statute nor by rule, cannot now be deemed invalid.

If denaturalization cases are to be put in a separate category governed by different procedural rules, the statutes or rules should so provide. The trial court cannot be said to have committed an error of law in following the rules as they now stand.

Petitioner argues that the controlling statute, 8 U. S. C. § 738, does not specifically authorize a default judgment of denaturalization. But the section does provide for the commencement of a civil action, akin to a suit in equity, and unquestionably Congress assumed that the rules of court applicable to civil actions would control without any necessity for an explicit reference to them.

Petitioner's argument rests ultimately on the decisions of this Court holding that the evidence in denaturalization cases must be clear, unequivocal and convincing. *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665. These were contested cases, however. It does not follow from the fact that the Government's burden is heavy when a defendant denies the charges and a case goes to trial that the Government must introduce evidence in order to obtain a judgment when the defendant defaults. Peti-

tioner suggests that the *Schneiderman* and *Baumgartner* cases require that in denaturalization cases the defendant must be accorded the same protection as in criminal cases (see Pet. Brief, p. 14). But as Judge Goodrich pointed out in his opinion below (R. 29):

> In other situations in the law courts have laid down requirements of a higher degree of proof than the mere preponderance of the evidence presented but no one thinks the proceedings become criminal trials on that account. Thus there is authority that when one attacks a release he has the burden of sustaining his allegations by clear, precise and indubitable proof.[5] The same is true in certain types of claims based on fraud.[6] The Congress, in regulating the acquisition and loss of citizenship rights has made such proceedings civil[7] and we think the action is not changed into a criminal prosecution by the fact that the Supreme Court has pointed out the necessity of clear evidence in a contested case to take away citizenship rights.
>
> [The footnote references are to citations.]

In addition to the cases cited by Judge Goodrich, there are other classes of civil actions in which an equally high standard of proof has been required without transforming a civil action into a criminal one. See *Maxwell Land-Grant Case*, 121 U. S. 325, 380-382, and cases cited.

Denaturalization proceedings are civil actions, treated as such both by Congress and this Court.

Provision for substituted service in Section 338(b) of the Nationality Act makes it clear that Congress deemed the action civil in character, and establishes also that Congress did not deem the presence of the defendant an absolute requirement for the entry of a judgment of denaturalization. Before the Rules of Civil Procedure abolished the distinction between law and equity, this Court frequently referred to denaturalization actions as equitable actions. *Johannessen* v. *United States*, 225 U. S. 227, 237; *Luria* v. *United States*, 231 U. S. 9; 27; *United States* v. *Ness*, 245 U. S. 319. And in *Knauer* v. *United States*, 328 U. S. 654, this Court upheld the decree of denaturalization based upon a trial without a jury. In so far, therefore, as petitioner claims as a matter of right the constitutional provisions relating to criminal trials, his contentions are manifestly without merit.

Petitioner's argument that he was entitled to have counsel appointed for him despite his default is also predicated on the erroneous assumption that denaturalization proceedings are to be treated as criminal cases. But, as we have shown, denaturalization cases are governed by the Civil Rules, and are not to be treated as criminal merely because of the heavy burden of proof which the Government bears. Petitioner's principal contention is that he was entitled to appointed counsel because he was in custody at the time of the default. If he had been held in such seclusion as to prevent his

taking any effective steps to defend himself, he might have ground for complaint. See p. 18, *supra*. But, his custody did not deprive him of any opportunity to obtain counsel. See pp. 21-31, *supra*. He does not allege that he made or attempted to make any effort on his own behalf, or that the prison authorities prevented him from doing so. On the contrary, his detention gave him his first contact with an attorney, and his failure to appear was a result of the attorney's neglect rather than his inability to obtain counsel as a result of his imprisonment. If petitioner had communicated with the court in New Jersey, asking for the assistance of counsel, undoubtedly counsel would have been appointed for him before the entry of default. But since, even in a criminal prosecution, a defendant may waive his right to counsel, the court was not required to appoint an attorney for a defendant who, by failing to indicate in any way that he wished to appear or answer, showed that he had decided not to contest the allegations of the complaint.

B. *Petitioner's application is untimely.* In any event, on the assumption that petitioner has alleged and shown an error of law on the face of the record, he would not be entitled to relief on this ground since his motion was not timely. Many cases in this Court and elsewhere establish that a bill of review for error of law apparent on the face of the record "must ordinarily be brought

within the time limited by statute for taking an appeal from the decree sought to be reviewed." *Central Trust Company* v. *Grant Locomotive Works*, 135 U. S. 207, 227; *Ensminger* v. *Powers*, 108 U. S. 292, 302; *Thomas* v. *Brockenbrough*, 10 Wheat. 146, 150-151; *Kennedy* v. *Georgia State Bank*, 8 How. 586, 609; *Fraenkl* v. *Cercedo*, 216 U. S. 295, 301; *Hagerott* v. *Adams*, 61 F. 2d 35, 36 (C.C.A. 8), certiorari denied, 288 U. S. 599, quoted *supra* p. 15, and cases cited therein; *Copeland* v. *Bruning*, 104 Fed. 169, 171 (C. C. D. Ind.); *McGinn* v. *United States*, 2 F. R. D. 562, 564 (D. Mass); 8 *Cyc. Fed. Proc.* 371-372;[11a] 3 Moore *Federal Practice* 3261-3262; Simkins, *Federal Practice* (3rd ed. 1938), section 720. Such bills of review were regarded as in the nature of writs of error, and for that reason were required to be filed within

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[11a] "But except as the basis of such a bill is newly discovered evidence, and to the extent that it is grounded upon alleged errors of law apparent upon the face of the record, it has always been held that the time limit for appealing is applicable by analogy and that a bill of review must be filed within the time to appeal. [citing 27 federal cases.] The time within which an appeal could be taken, up to comparatively recent years, was so long that there was little occasion in the early cases to distinguish between bills of review based upon newly discovered evidence and those based upon errors of law, or to apply a time limitation; but time to appeal has gradually been shortened to such an extent that now, being ordinarily less than the six months' limitation on motions to vacate or change judgments under Rule 60(b) of the Rules of Civil Procedure, the remedy by bill of review for errors apparent upon the face of the record is practically obsolete." 8 *Cyc. Fed. Proc.* 371-372.

the time for appeal. Bills of review based upon newly discovered evidence or other matter discovered after the entry of judgment were governed by the requirement of due diligence. See pp. 15-16, *supra*.

Petitioner's contention that the default judgment should not have been entered without the introduction of evidence supporting the complaint is in effect an application for a bill of review for error of law apparent on the face of the record. His application on this ground is clearly too late under the authorities requiring such a bill to be filed within appeal time. And the result would be the same if the general doctrine of laches were applicable. The facts discussed in Point II of this brief (pp. 20-31), showing that petitioner was not deprived of an opportunity to defend, establish that he was guilty of laches in failing sooner to seek equitable relief. The district court and both opinions of the majority in the circuit court of appeals stress the factor of laches as in itself warranting denial of petitioner's application.

IV.

PETITIONER IS NOT ENTITLED TO HAVE THE JUDGMENT VACATED ON THE GROUND THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION.

Petitioner also contends that it appears from the face of the complaint that the Government would not have been able to prove its case by clear, unequivocal and convincing evidence had a hearing

been conducted. Obviously, in the face of the specific allegation of fraud at the time of the oath of allegiance, that is not an error of law apparent on the face of the record. As stated above, an action to set aside a certificate of denaturalization for fraud in the oath of allegiance is a proper action under Section 338 of the Nationality Act. *Knauer* v. *United States*, 328 U. S. 654. Furthermore, on the face of the complaint itself it appears that petitioner's case is much closer to *Knauer* v. *United States*, *supra*, than to *Baumgartner* v. *United States*, 322 U. S. 665, since from the allegations of paragraph 6 of the complaint (R. 3-4), it appears that, very shortly after his naturalization, petitioner was not only an active and effective member of organizations whose principles were incompatible with allegiance to the United States or attachment to the principles of the Constitution, but was a leader of such organizations. Hence petitioner's contention that his was not a proper case for denaturalization does not find support in the record.

Even assuming that the evidence as spelled out in paragraph 6 of the complaint would not have met the test of the *Baumgartner* decision, a bill of review would not lie on such ground. Since the Government was not required to plead its evidence and since the general allegation of fraudulent intent is clearly sufficient to state a cause of action (see complaint in *Knauer* v. *United States*, 328

U. S. 654, October Term, 1945, No. 510, Transcript of Record, p. 1), petitioner's argument seems to be based on the assumption, wholly speculative inasmuch as no evidence at all has been introduced, that the proof under this general allegation would have been inadequate. But a bill of review was never available to reach the sufficiency of the evidence. *Putnam* v. *Day*, 22 Wall. 60, 65; *Beard* v. *Burts*, 95 U. S. 434, 436; *Buffington* v. *Harvey*, 95 U. S. 99. And in *Scotten* v. *Littlefield*, 235 U. S. 407, 411, this Court held that a subsequent decision in another case based on principles which would have required a different result as to the decree under attack, "will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result." See also *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88.

Where defendants have contested denaturalization proceedings but failed to appeal from an adverse decree, the courts having denied bills of review attacking the decree on the basis of the later *Baumgartner* decision. *United States* v. *Kunz*, 163 F. 2d 344 (C. C. A. 2); *Krause* v. *United States*, certiorari denied, 327 U. S. 784.[12] Certainly petitioner, who by his default, admitted the allega-

[12] In the *Krause* case no opinion on the motion to vacate was rendered by the court of appeals. The issue is disclosed by and discussed in the petition for certiorari and the brief in opposition. October Term, 1945, No. 702, 327 U. S. 781. For the earlier opinion of the Seventh Circuit affirming Krause's denaturalization, see 136 F. 2d 935.

tion of fraud in the complaint, is not entitled to greater relief.

Petitioner is also barred from seeking relief on this ground because of his unreasonable delay in bringing this action. See pp. 15-16, 43-45, 23-34, *supra*.

V.

THE RECENT AMENDMENT TO RULE 60(b) REQUIRES NO DIFFERENT RESULT.

A. *The amendment does not govern this case.* —As has been noted, the amendments to the Federal Rules of Civil Procedure became effective on March 19, 1948, after the court below had rendered its decision affirming the refusal of the district court to vacate the default judgment of denaturalization. Rule 86(b), dealing with the effective date of these amendments, provides that "They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

Applying only to "further proceedings in actions then pending", the amendments to the Rules have no retroactive effect. They cannot render unlawful what the district and circuit courts of appeals did before the amendments came into effect. They apparently do not contemplate re-

versal by an appellate court of a trial court decision which was correct when entered. If there are to be "further proceedings" in the district court, the amendments will normally apply; but they were not intended to afford a means of reopening proceedings that had been completed in the district court before their effective date.

B. *Petitioner is not entitled to relief under the amendment.*—But even assuming that amended Rule 60 (b) could be regarded as applicable to this case, we believe that an affirmance of the decision below is required. The amended rule abolishes the old writs and bill of review. It provides for relief from judgments for six reasons. Motions based upon (1) mistake, inadvertence, surprise or excusable neglect, (2) newly discovered evidence, and (3) fraud, misrepresentation, or "other misconduct of an adverse party", must be made within one year. Motions made for the other reasons specified, which include (4) judgments shown to be void and (6) "any other reason justifying relief from the operation of the judgment" are expressly required to be made "within a reasonable time." The rule does not limit the power of courts to entertain an independent action, to grant relief to a defendant not actually notified, or to set aside a judgment for a fraud on the court.

In so far as the amended rule provides for relief by motion, petitioner's allegations with respect to his arrest and subsequent custody attempt to establish either excusable neglect under

subdivision (1), or "misconduct of an adverse party" under subdivision (3). Under the amended rule, however, the time to bring a motion on either of such grounds is limited to one year after judgment—a period which has long since expired.

Hence, except for subdivision (6) of the amended Rule, a point we discuss *infra*, pp. 51-52, it appears that under amended Rule 60(b), petitioner could attempt to impeach the judgment for errors of fact only by an independent action, a form of relief preserved by the amended Rule. See Notes of Advisory Comm. on amendment to Rule 60(b), 28 U. S. C. p. 3320. A showing that a defendant, without fault on his part, has been deprived by the adverse party of an opportunity to present a defense would be grounds for an independent action in equity (*United States* v. *Throckmorton*, 98 U. S. 61, 65-67), and petitioner's allegations that his custody prevented him from making a defense might be deemed to present such a cause of action. This Court has held, however, that an independent action does not lie against the United States without its consent. *Hill* v. *United States*, 9 How. 386, 389; *Avery* v. *United States*, 12 Wall. 304. See also *Zegura* v. *United States*, 104 F. 2d 34, 35-36 (C. C. A. 5), certiorari denied, 308 U. S. 586; *Gherwal* v. *United States*, 46 F. 2d 998 (C. C. A. 9).

As to petitioner's allegations of errors of law, he could, under the amended Rule, attack the judgment by motion only under subdivision (4)

on the ground that the judgment was void. However, the judgment of denaturalization clearly is not void, inasmuch as the petitioner was personally served, the complaint states a cause of action within the jurisdiction of the court, and the relief granted was also within the district court's authority. See *Knauer* v. *United States*, 328 U. S. 654. As to the alleged errors of law which do not affect basic jurisdiction, we entertain serious doubts as to whether the old bill of review for non-jurisdictional errors apparent on the face of the record has any vitality under amended Rule 60(b). The new rule abolishes bills of review. While it specifies the other errors reached by that type of proceeding—newly discovered evidence and fraud—it makes no mention of the type of error reached by a bill of review for error apparent. As noted above, pp. 43-45, the bill of review for error apparent served the purpose of a writ of error and was limited by the time for appeal. Appeal is a completely adequate remedy for the kind of defect reached by that proceeding. While the notes to the amended Rule are silent on the point, the language of the amended Rule seems to point toward the conclusion that the type of error which could be attacked either by a bill of review for error apparent or by appeal will no longer form the basis of a motion to vacate in the district court. Such error apparently did not form the basis of an independent action, certainly not after the time to appeal had expired. Furthermore, as we have

shown in Point III, there are no errors of law apparent on the face of the record.

There remains for consideration petitioner's rights under subdivision (6) of the amended Rule providing for the vacating of a judgment by motion for "any other reason justifying relief from the operation of the judgment." This amendment (together with other changes made in the draft Rule as proposed) was adopted in the precise form suggested in Moore and Rogers' article. 55 Yale L. J. at pages 692-693. The authors recommended that if an inclusive rule stating specific grounds was to be adopted "some general residual clause would probably be necessary to cover unforeseen contingencies even at the risk of undercutting the principle of inclusiveness."

We think it is clear that Subdivision (6) was not meant to bring about a fundamental change in the principle that final judgments are not lightly to be set aside for insubstantial reasons; the subdivision was included in the rules to permit some flexibility in the application to particular facts of the principles developed under the old remedies without being completely bound by the narrow circumstances in which the older remedies applied.

We do not believe that petitioner would be entitled to relief under this subdivision. As we have said, it is not our position that petitioner cannot obtain relief on a showing of basic injustice; it is our position that, for reasons set forth in Points II and III, *supra*, he has made no such showing.

Furthermore the amended Rule makes explicit what was implied in the original Rule—that all motions not required to be made within a specified period must be made "within a reasonable time." This limitation applies to subdivisions (4) and (6). For reasons already stated (pp. 21-34, *supra*), we think it clear that four and one-half years was an unreasonable time for petitioner to wait before moving to vacate the judgment in this case.

CONCLUSION

Petitioner has shown no fundamental error of fact or of law invalidating the judgment of denaturalization. He has shown merely a newly awakened interest in American citizenship four and one-half years after he permitted the denaturalization judgment to be entered against him. We therefore respectfully submit that the judgment below should be affirmed.

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October 1948.

APPENDIX.

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 6(b), Federal Rules of Civil Procedure,[5]

[5] As amended, these rules and the notes of the Advisory Committee with respect thereto appear in 28 U. S. C. fol. sec. 723(c).

prior to its recent amendment, provided:

> (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

As amended, the Rule changes the last clause to read as follows:

> * * * but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

Rule 55(b) (2) of the Federal Rules of Civil Procedure provides in part:

> * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to

make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its recent amendment, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.

Rule 60(b) as amended, provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 86(b) provides:

EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

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